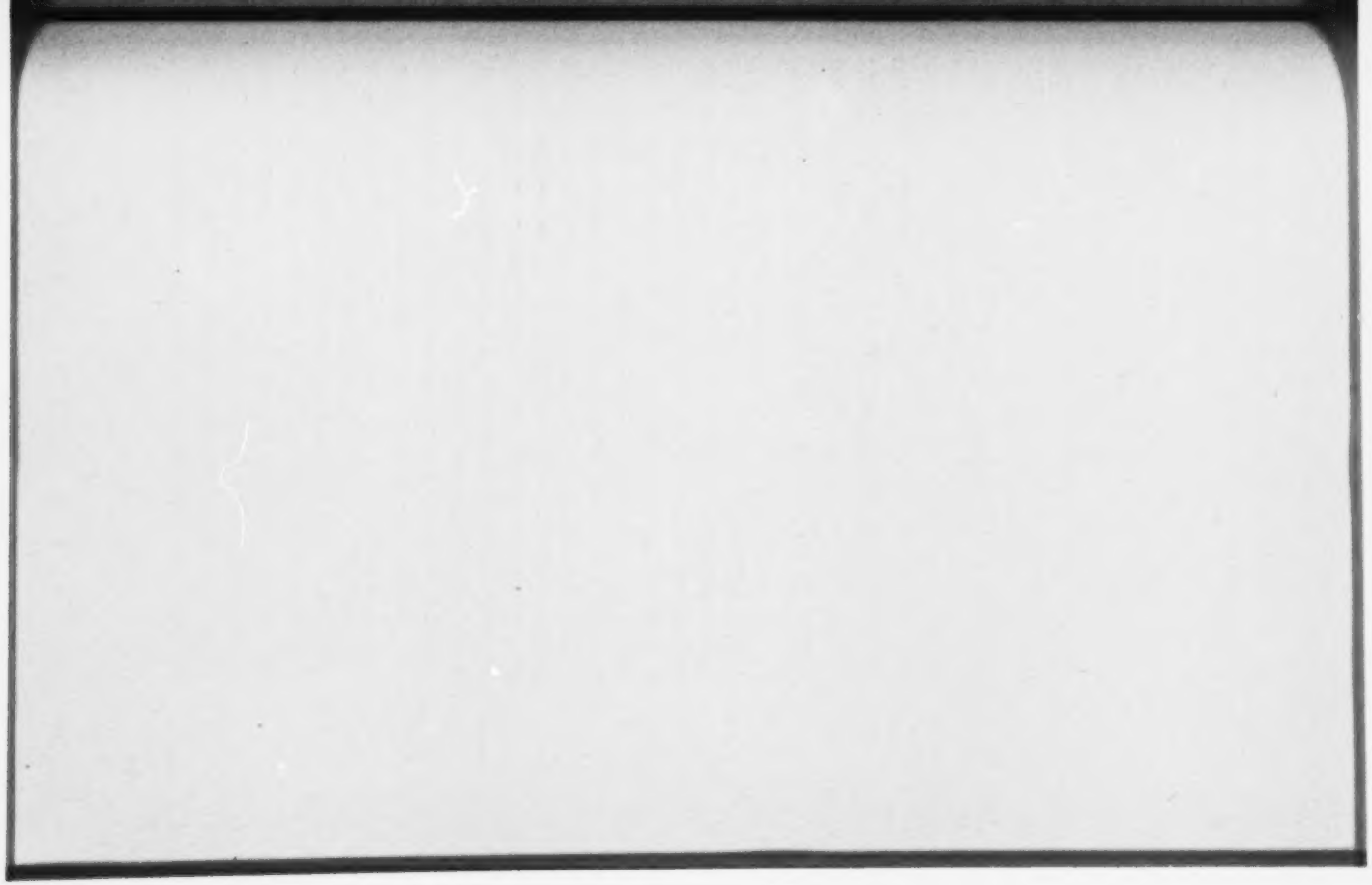

No. 439

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Supreme Court of the United States

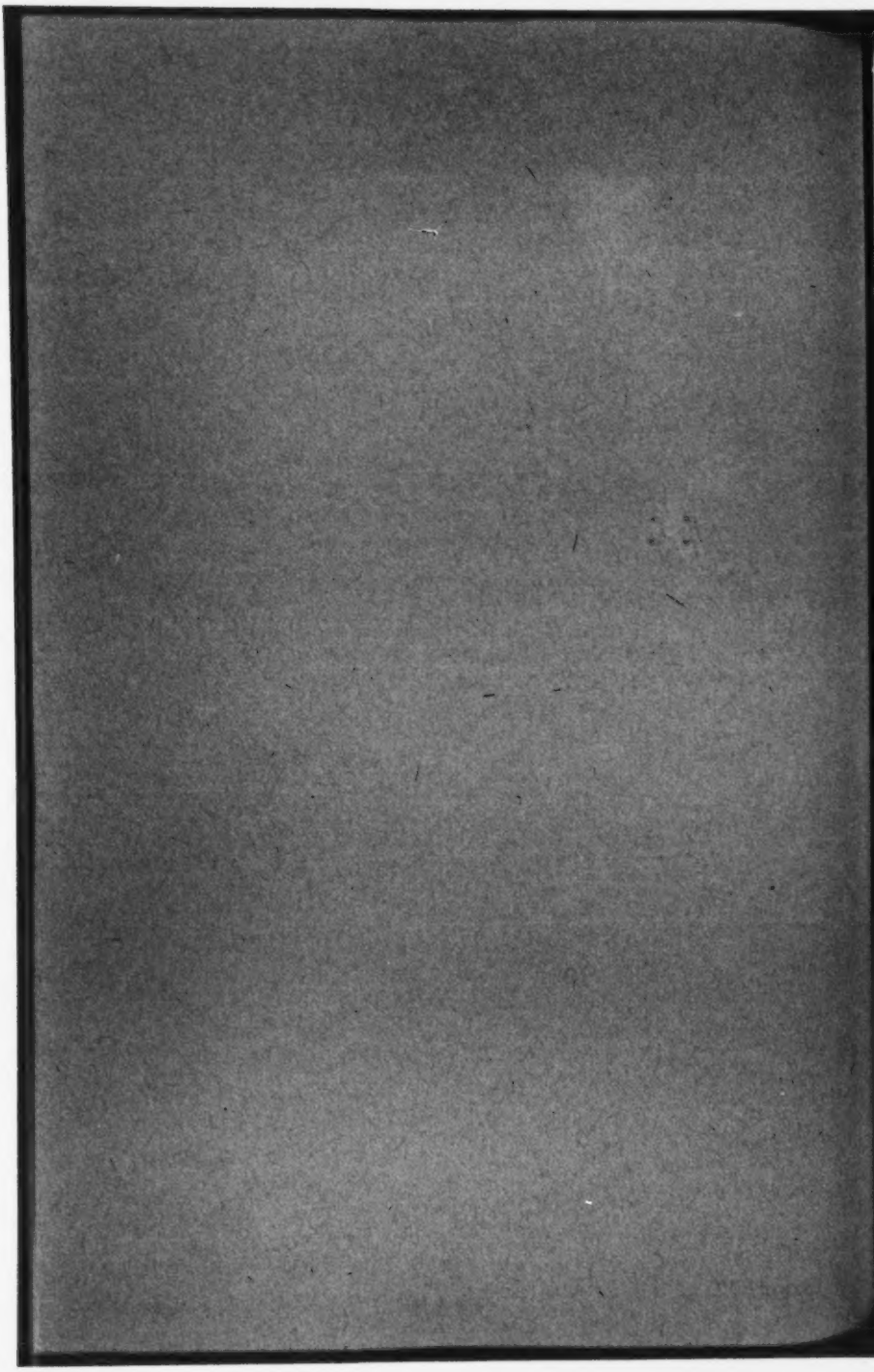
OCTOBER TERM, 1945

C. C. FLETCHER AND E. E. WAKEMAN, as surviving Trustees of the Standard Bentonite Company, a trust,
PETITIONERS,

vs.

FRANK G. CLARK, as Collector of Internal Revenue for the Collection District of Wyoming,
RESPONDENT.

PETITION FOR REHEARING UPON DENIAL OF PETITION FOR WRIT OF CERTIORARI



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C. C. Fletcher and E. E. Wakeman, as surviving Trustees of the Standard Bentonite Company, a trust, petitioners in this cause, respectfully present this, their petition for rehearing upon the denial of their petition for a writ of certiorari, heretofore filed herein, and submit the following reasons why this matter should be decided by this Honorable Court:

There are at least three questions in this case which are as new in this Honorable Court as tomorrow morning. They were neither raised nor settled in *Morrissey v. Commissioner* (1935), 296 U. S. 344. Nor were they raised or

settled in any of the companion cases decided the same day as the *Morrissey* case. Nor have they since been decided by this tribunal. Those questions are as follows:

I. Does the United States *have power*, under applicable tax statutes, to tax income exclusively from property held in trust, as the income of an association or corporation?

II. Does the mere existence in a trust instrument of a grant of power to the trustees to engage in business operations, *although never used*, make a trust, otherwise taxable as an individual, taxable as an association or corporation?

III. May a trust which was *actually in the process of liquidation* be taxed as an association or corporation carrying on a going, day to day business for profit?

We submit that these are serious questions and that the correct answers thereto are of importance not only to petitioners but to a great number of other taxpayers. They were not anticipated when the Morrissey and related decisions were handed down in 1935. And, as the United States, basing its action on the opinion below in petitioners' case, increases the range of its grasp to include other trusts situated like petitioners' trust, it seems reasonable to expect that a stream of other cases on these same issues, will arise and flow into this Honorable Court, until such time as the stream is dammed by an authoritative decision.

The questions will be discussed below in the order above set out.

I. Section 161 (a) of the Internal Revenue Code, so far as material here, says that "The taxes imposed by this chapter upon *individuals* shall apply to the *income* of . . . any kind of property held in trust." (Emphasis supplied.) There is no limitation or specification of the *kind of trust* which may derive income merely from the holding of property in trust and still be taxed on that income as an individual. The determining factor is *the kind of income.* Is it from *operating* a business? If so, it may be taxed as that of an association or corporation. Is it from "property held in trust"? *If so, it is taxed as that of an individual.*

The undisputed evidence in this case and the decisions below show that the income here taxed as that of an asso-

ciation or corporation *was exclusively from property held in trust.* Yet, despite Section 161 (a), it has been taxed as though it were not.

It is true that the Treasury Regulations give no effect to Section 161 (a) in this behalf and that the courts below have held that Section inapplicable in this case. It is equally true that the Treasury Regulations may neither expand nor change the law and that no part of the taxing statutes may be regarded as a nullity.

May Section 161 (a) be ignored in the circumstances here in view? Is it inapplicable in this and similar cases? Does the United States have power, despite the provisions of Section 161 (a), above noted, to tax income exclusively from property held in trust, as the income of an association or corporation?

There can be no authoritative answers given to these questions except by this Honorable Court.

II. This Honorable Court has never, in *Morrissey v. Commissioner* (1935), 296 U. S. 344, or in any of its companion cases, or in any other case, held that *unused* power to operate a business enterprise, granted the trustees in the trust indenture, made the trust taxable as an association or corporation. *In the Morrissey and related cases, powers granted the trustees to carry on business operations were exercised to the utmost extent. In petitioners' case such power was never used, even in the slightest degree.*

The courts below, in reliance upon the *Morrissey* and related decisions, held in petitioners' case that the mere *existence* in petitioners' trust instrument of power to operate the mining claims in view, *although admittedly unused,* was sufficient to make petitioners' trust taxable as an association or corporation. *In so holding the Tenth Circuit came into diametric conflict with the Sixth Circuit.*

It may not be assumed that the Sixth Circuit has overlooked the decisions by this Honorable Court in the *Morrissey* and related cases. On the contrary it must be admitted that the Sixth Circuit feels the compulsion of the *Morrissey* decision and its companion decisions in as high a degree as

does the Tenth Circuit. Indeed, both must consider themselves controlled by those decisions. Yet, in 1941, approximately six years after the Morrissey and related cases were decided, the Sixth Circuit held that the contention that "taxability must be determined from the language appearing in the instruments . . . must be *rejected*"; and that "The crucial test . . . must be found in what the *trustees actually do and not in the existence of long unused powers.*" (Emphasis supplied.) (*Commissioner v. Gibbs-Preyer Trusts Nos. 1 and 2*, (CCA-6, 1941), 117 Fed. 2d 619).

There can be only one reason for the conflict above noted. It is a difference in *understanding*, between the Tenth and Sixth Circuits of the rules of law to be gathered from the *Morrissey* and related decisions. Petitioners' case affords this Honorable Court an opportunity to reconcile the divergent views of these Circuits.

Which Circuit has applied the correct test, the Sixth or the Tenth? Does the mere existence in a trust instrument of power granted the trustees to carry on a business enterprise, *although never used*, make a trust, otherwise taxable as an individual, taxable as an association or corporation? What *are* the correct rules of law, pertinent here, to be gathered from the *Morrissey* and related decisions?

Until this Honorable Court decides these questions, citizens must remain in the dark.

III. The trust involved in the *Morrissey* case ". . . was not a liquidating trust; . . ." (p. 361). Petitioners' trust *was* a liquidating trust. The uncontradicted evidence in the record shows that the very income here taxed resulted exclusively from seven sales of the trust corpus, the seventh sale being of the entire remainder of that corpus. Thus, like a human being who, with every breath he draws, advances that far towards the grave, petitioners' trust was, as the result of every transaction into which it entered, that much nearer extinction. The record supports this assertion for it shows that petitioners, as Trustees, had no power to invest in other trust property. Their authority existed only with respect to the six bentonite mining claims originally conveyed to them in trust. As corpus was converted into cash,

they had no authority to do anything other than distribute the cash. Here, certainly, is a situation that not only did not exist in the *Morrissey* case, but is one which was excluded from the effect of the *Morrissey* decision by this Honorable Court itself. ("It was not a liquidating trust. . ." p. 361.)

May a trust which was *actually in the process of liquidation* be taxed as an association or corporation carrying on a going, day to day business for profit? This question was not in the *Morrissey* and related cases. Petitioners raised it below, but it was neither answered nor mentioned in the decision by the Tenth Circuit Court of Appeals. *It is still in this case and will, no doubt, arise time and again in many other cases.* What is the authoritative answer? Petitioners do not know. Others do not know. Until this Honorable Court speaks, taxpayers can only guess.

WHEREFORE, your petitioners respectfully pray that this Honorable Court recall its order of ~~October 5, 1945,~~ Nov. 5, 1945 denying their petition for a writ of certiorari to be issued to the United States Circuit Court of Appeals, Tenth Circuit, and issue said writ according to the prayer of their original petition herein.

C. C. FLETCHER AND E. E. WAKEMAN,
as surviving Trustees of the Standard
Bentonite Company, a trust.

By: GEORGE T. EVANS,
1229 First National Bank Bldg.,
Denver 2, Colorado.
COUNSEL FOR PETITIONERS.

I certify that the foregoing petition is, in my opinion, well founded and that it is not made for the purpose of delay.

GEORGE T. EVANS